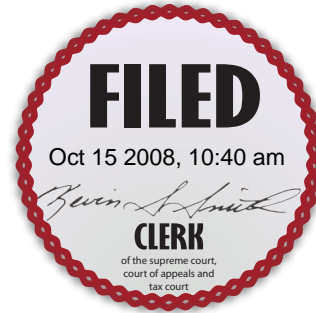


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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VINCENT ANGOTTI,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 64A03-0805-CR-234

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APPEAL FROM THE PORTER SUPERIOR COURT  
The Honorable Roger V. Bradford, Judge  
Cause Nos. 64D01-0604-FA-2962, 64D01-0606-FA-4868

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**October 15, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Defendant Vincent Angotti appeals following his convictions pursuant to guilty pleas to Child Molesting as a Class B felony<sup>1</sup> in Cause Number 64D01-0604-FA-2962 (“2962”) and Child Molesting as a Class C felony<sup>2</sup> in Cause Number 64D01-0606-FA-4868 (“4868”), for which he received an aggregate sentence of twenty-eight years with eighteen years to be served in the Department of Correction and ten years suspended to probation. On appeal, Angotti challenges his alleged maximum sentence by claiming that the trial court abused its discretion in sentencing him and that his sentence is inappropriate in light of the nature of his offenses and his character. Concluding that Angotti has waived his right to appeal his sentence, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

The following are facts relevant to Cause Number 2962.<sup>3</sup> Beginning in approximately 1996, Angotti touched K.C.’s genitalia on a number of occasions both over and under her clothing, and he also penetrated her vagina with his fingers. K.C. was eight years old at the time. Beginning when K.C. was twelve years old, from approximately 2000 to 2003, Angotti engaged in sexual intercourse and oral sex with K.C. Angotti was in his mid-to-late thirties during this time. The encounters terminated when K.C. was approximately fifteen years old. K.C. reported the acts in November of

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<sup>1</sup> Ind. Code § 35-42-4-3(a) (2000).

<sup>2</sup> Ind. Code § 35-42-4-3(b) (2002).

<sup>3</sup> There was no factual basis entered on the record, but the State offered Exhibits 1 and 2 as evidence, and defense counsel indicated he had no objection to these exhibits. The trial court’s finding of guilt and judgment of conviction were based on the evidence in these exhibits. Noticeably, the plea agreement stated that Angotti would plead guilty to “orally amended” counts of Class B felony child molesting in Cause No. 2962 and Class C felony child molesting in Cause No. 4868, yet the record does not contain these amended informations.

2005. On April 4, 2006, the State charged Angotti with two counts of Class A felony and one count of Class C felony child molesting.

With respect to the facts relevant to Cause Number 4868, in November 2002, Angotti placed his penis into his niece C.H.'s mouth. C.H. was seven years old at the time. Apparently C.H. awoke in the middle of the night and observed Angotti walk toward her, remove his penis from his shorts, and place it in her mouth, shaking it, for approximately ten to thirty seconds. On June 6, 2006, the State charged Angotti with Class A felony child molesting.

On January 4, 2008, Angotti pled guilty, pursuant to a plea agreement, to one count of Class B felony child molesting in Cause No. 2962 and one count of Class C felony child molesting in Cause No. 4868. In exchange, the State agreed to dismiss the remaining charges in Cause No. 2962. As an additional term of the plea agreement, the parties agreed that the sentence in Cause No. 4868 would be a suspended sentence but that it was to run consecutive to the sentence in Cause No. 2962.

The trial court subsequently sentenced Angotti to a term of twenty years, with eighteen years executed, in Cause No. 2962, and to a consecutive term of eight years, with all eight years suspended, in Cause No. 4868. This appeal follows.

### **DISCUSSION AND DECISION**

Upon appeal, Angotti challenges his sentence. The State claims that he has waived his right to appeal on this ground. Angotti's plea agreement included the following term in Paragraph 9: "I waive all right to contest my conviction, my sentence, any restitution order imposed, or the manner in which my conviction, my sentence, or the

restitution order was determined or imposed on any grounds in this cause either by direct appeal or by post-conviction relief.” App. p. 64. The defendant signed the plea agreement and confirmed that he had done so during the guilty plea hearing.

In *Creech v. State*, 887 N.E.2d 73, 74-75 (Ind. 2008), the Indiana Supreme Court held that a defendant may waive his right to appellate review of his sentence as part of a written plea agreement so long as the waiver is knowing and voluntary. Angotti acknowledges the above waiver term but claims it is invalid on a number of grounds.

Angotti first points to the broad language in the waiver provision which he claims is partially invalid and therefore voids the entire provision. Certainly the clause in Angotti’s waiver provision purporting to waive Angotti’s right to seek post-conviction relief is invalid. The Supreme Court has held that provisions in plea agreements waiving a defendant’s right to seek post-conviction relief are void and unenforceable. *Creech*, 887 N.E.2d at 75-76. We are unconvinced, however, that this single void clause somehow poisons the entire waiver provision. Indeed, as Angotti acknowledges, if a covenant is clearly separated into parts and some parts are reasonable and others are not, the contract may be held divisible, the offensive clauses may be stricken, and the reasonable restrictions may be enforced. *See Smart Corp. v. Grider*, 650 N.E.2d 80, 83-84 (Ind. Ct. App. 1995), *trans. denied*. When the offending language is stricken from the waiver provision, the remaining language unequivocally expresses the parties’ intentions that Angotti waive his right to a direct appeal. We therefore reject Angotti’s argument that one void clause somehow invalidates the entire waiver provision.

Along this same vein, Angotti argues that the waiver provision is “too broad to be enforceable,” and that by waiving his right to a direct appeal, Angotti is giving up his right to challenge an excessive sentence. To the contrary, pursuant to Post-Conviction Rule 1(1)(a)(3) a defendant is always entitled to seek post-conviction relief based upon a sentence which exceeds the statutory maximum or is otherwise erroneous. We are unpersuaded by Angotti’s argument on this ground.

Angotti also argues that his waiver was not knowing or voluntary because the trial court failed to confirm his understanding of it during the plea hearing.<sup>4</sup> The Supreme Court specifically rejected this argument in *Creech* on the basis that neither the Indiana Rules of Criminal Procedure nor the Indiana Code required trial courts accepting plea agreements to make express findings regarding a defendant’s intention to waive his appellate rights. 887 N.E.2d at 77.

Angotti further challenges his waiver by claiming that the trial court invalidated it by making references to the Court of Appeals during sentencing, suggesting that Angotti had nevertheless retained the right to appeal. This argument is similarly untenable under *Creech*, where the Supreme Court determined that subsequent actions by the trial court following a defendant’s plea were presumed to have no effect on the plea transaction, even in cases where a defendant was erroneously advised that he had a right to appeal. *Id.* at 76-77. Here, the trial court merely made references to the Court of Appeals during

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<sup>4</sup> Angotti submits *Clay v. State*, 882 N.E.2d 773, 776 (Ind. Ct. App. 2008) as authority for this proposition. To the extent that *Clay* survives *Creech*, it is distinguishable in that the plea agreement in *Clay* involved extensive negotiations and multiple drafts, suggesting that there was some question as to the ultimate terms of the plea and that it needed clarification on the record.

the sentencing hearing, more than two months after Angotti had pled guilty and received the benefit of the bargain. Under *Creech* these references did not invalidate his plea agreement.

Given Angotti's waiver of any direct appeal to his sentence and the Supreme Court's ruling in *Creech* that such waivers are enforceable, we conclude that Angotti's challenge to his sentence is waived.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.